UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

AUTO-OWNERS INSURANCE COMPANY, a corporation,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 4:07-CV-00394**
	)	
MID-AMERICA PIPING, INC., et al.	)	
	)	
Defendants.	)	

ORDER

On September 27, 2007, this Court dismissed Plaintiff's negligence claims in that any recovery in tort was barred by the "Economic Loss Doctrine." Now before the Court, Plaintiff moves for reconsideration of the Court's Order on the basis that Missouri courts have only applied the Doctrine to the sale of goods (i.e. products liability cases), and *not the rendition of services.* Plaintiff further insists that the Court erred in distinguishing between the duty to provide a "professional" standard of care as opposed to a "reasonable person" standard of care in determining whether the Doctrine is applicable.

While Plaintiff is certainly entitled to its interpretation, the Court notes that the subject body of law as it relates to the instant matter is quite unresolved. Upon reconsideration, the Court finds Plaintiff's arguments inapposite.

When sitting in diversity, substantive issues shall be governed by state law. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Where the state's highest court has resolved the issues in question, it shall be binding upon the district court; conversely, where there is no bright line rule, the court must predict how the state supreme court would resolve the issue. *St. Paul Fire & Marine Co. v. Schrum*, 149 F.3d 878, 880 (8th Cir. 1998); *Jackson v. Anchor Packing Co.*, 994 F.2d 1295, 1301 (8th Cir. 1993). *See also St. Paul Fire*, 149 F.3d at 880 (absent controlling authority, the district court may consider "relevant state precedent, analogous decisions, considered dicta, ... and any other reliable date.") (quoting *Lindsay Mfg. Co. v. Hartford Accident & Indem. Co.*, 118 F.3d 1263, 1267 (8th Cir. 1997)). Intermediate state court decisions should not be disregarded "unless [we are] convinced by other persuasive data that the highest

state court would decide [the issue] otherwise." *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967); *United Fire & Cas. Ins. Co. v. Garvey*, 328 F.3d 411, 413 (8th Cir. 2003).

In *Crowder v. Vandendeale*, the Missouri Supreme Court held that a subsequent purchaser of a home could not sue the builder in tort for property damage caused to his home. 564 S.W.2d 879, 884 (Mo. 1978). In so holding, the court reasoned that the builder owed no other duty to protect from deterioration or loss than that bargained for and arising in contract, and that the contractual remedy was adequate and appropriate. *Id*. at 882-84.

In *Sharp Bros. Contracting Co. v. American Hoist & Derrick Co.*, 703 S.W.2d 901, 903 (Mo. 1986), the Missouri Supreme Court denied recovery in tort where the only alleged damage was to the product sold (citing PROSSER AND KEETON ON TORTS (5th ed. 1984)). The dispute in *Sharp* involved a crane, whose counterweight broke and crushed the crane's cab, causing property damage only to itself. *Sharp*, 703 S.W.2d at 902. The *Sharp* court held that the crane's purchaser could not seek relief for loss of the crane's use and value under a theory of strict liability. *Id*.

In so holding, the court acknowledged that, in certain cases, suppliers must be held strictly liable to ensure the maximum possible protection to the end user, and to properly shift (i) the cost to those best able to afford the same, and (ii) the duty to those best able to prevent the risk. *Sharp*, 703 S.W.2d at 902 (citing Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 799 (1966), *and Keener v. Dayton Electric Mfg. Co.*, 445 S.W.2d 362, 364 (Mo. 1969)). Nonetheless, the court reasoned that, while strict liability permits recovery for damage sustained to the product itself, it seems more appropriate to seek such recovery under a contract theory, in that the parties presumably allocated the risk of harm (i.e. based on the product's condition) pursuant to their bargain. *Sharp*, 703 S.W.2d at 902-03 (citing PROSSER & KEETON, *supra*.). Therefore, where the damage to property was reasonably foreseeable and within the scope of the parties' contract, the recovery for such damage should be limited to that available under contract law. *Id*. at 903. In contrast, the seller would still be strictly liable "for physical harm to persons and tangible things other than the defective product itself" (or things presumably outside the contractual scope). *Id*.

Turning to the instant dispute, the Court acknowledges the ambiguous nature of the beast. Upon review of Missouri Supreme Court precedent and relevant secondary sources, the Court disagrees with Plaintiff's contention, that the above holding was intended to limit the application

of the Economic Loss Doctrine solely to cases involving property damage to goods. Rather, the Court interprets *Sharp* to bar tort recovery where the sustained damage is within the scope of the parties' contract.

Today's finding is supported by the policy set forth in PROSSER & KEETON, *supra* §92 at 655-57. "Tort obligations are[,] in general[,] obligations that are imposed by law- apart from and independent of promises made[,] and therefore apart from the manifested intention of the parties- to avoid injury to others." *Id*. at 655. The law of tort is imposed and intended to protect interests in both tangible and intangible things, economic and relational, on the basis of policy. *Id*. It is not intended to enforce "an intention to do or not to do something in the future," e.g., a contractual duty. *Id*. In contrast, "[c]ontract obligations are created to enforce promises," and are "based on the manifested intention of the parties to a bargaining transaction." *Id*. at 656. Although there certainly are situations in which contracting parties may also be liable in tort; generally, recovery for intangible economic losses is governed by contract law. *Id*. at 656-57.

> Generally speaking, there is no general duty to avoid intangible economic loss or losses to others that do not arise from tangible physical harm to persons and tangible things. This being so, the manifested intent of the parties should ordinarily control the nature and extent of the obligations of the parties to a contract of sale, either of real or personal property *or a contract of service*. *Id*. at 657 (emphasis added).

Upon review of the present facts, there appear to be three types of contracts at issue. First, Defendants O'Connor and Branson, entered into an agency contract whereby Defendants Midwest Agency ("Midwest) and/or B.O.O., LLC ("BOO") was authorized to solicit and secure applications, and to bind coverages of various types of bonds, on behalf of Plaintiff Auto-Owners Insurance Company ("Auto"). Next, O'Connor and Branson, entered into power of attorney agreements (and the incorporated Letters of Instructions) appointing Midwest and/or BOO to be Auto's attorney-in-fact, and granting it authority to "execute, seal, and deliver on its behalf as surety, any and all bonds and undertakings..." Lastly, the guaranty agreements entered into by Branson and O'Connor made each jointly and severally liable to Auto for Midwest and/or Boo's obligations thereto.

In the complaint, Plaintiff seeks damages for breach of contract, in that Defendants exceeded their express grant of authority in issuing the disputed bonds, and thereby breached the provisions of one or more of the above agreements. Further, Plaintiff seeks damages for negligence in that Defendants failed to exercise reasonable care (i) in obtaining sufficient

information/documentation to allow for a well-informed, reasonable decision regarding the issuance of bonds; (ii) in obtaining express approval/authorization from Auto prior to the issuance of said bonds; and (iii) in providing timely notice to Auto regarding said issuance. Upon review of the subject contracts, the Court finds each of the foregoing allegations to be reasonably foreseeable and to fall well within the parties' express, bargained-for arrangement.

As a final note, the Court's reference and analysis as to a "professional" standard of care in its previous Order sought to assess whether there was some special duty owed to Plaintiff, potentially giving rise to non-contractual remedies; there was not.

In accordance with the above analysis, the Court declines to afford an additional remedy in tort. *See* PROSSER & KEETON, *supra* §92 at 655 ("It is to be hoped that eventually the availability of both theories- tort and contract- for the same kind of loss ... will be reduced in order to simplify the law and reduce the costs of litigation.").

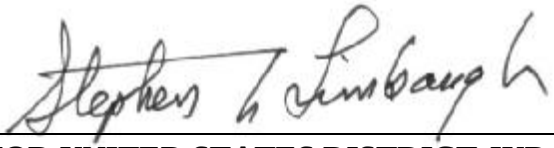
See also Trimble v. Asarco, Inc., 232 F.3d 946, 963 (8th Cir. 2000) (In a diversity case, it may be both imprudent and improper for a federal court to expand substantive liability under state law.) (citing *Tucker v. Paxson Mach. Co.*, 645 F.2d 620 (8th Cir. 1981)).

IT IS HEREBY ORDERED that Plaintiff's motion for reconsideration (Doc. #48) be, and is, **HEREBY GRANTED**.

Upon reconsideration of Defendants' motions to dismiss (Docs. #9, #11, #13; filed March 26, 2007)), **IT IS FURTHER ORDERED** that the Court's Order (Doc. #47) be, and is, **HEREBY ADOPTED**, **RE-INCORPORATED**, and **SUSTAINED**.

IT IS FINALLY ORDERED that this cause shall remain on the Court's trial docket of August 11, 2008.

Dated this 17th day of March, 2008.



SENIOR UNITED STATES DISTRICT JUDGE